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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ELLIOTT LEWIS, an individual, on behalf of himself, and all others similarly situated,

Plaintiff,

v.

WENDY'S INTERNATIONAL, INC., a Corporation; and DOES 1-20, inclusive,

Defendant.

Case No. 09-CV-7193 MMM (JCx)

Assigned for all purposes to Honorable Margaret M. Morrow

REPLY IN SUPPORT OF MOTION TO DISMISS SECOND AMENDED COMPLAINT

Date: June 26, 2010*
Time: 10:00 a.m.
Place: Roybal - Courtroom 780

[*The parties have stipulated to continue this hearing date to Sept. 20, 2010 per Docket 44]

REPLY

I. PLAINTIFF CONCEDES THAT HIS PAGA CLAIM SHOULD BE DISMISSED.

Plaintiff concedes the point, including that he would first be required to obtain an Order modifying the Rule 16 Schedule Order, and then obtain leave to amend, all before he could plead this claim. Opp. at 2:12-3:2. Accordingly, Plaintiff's improper and unilaterally added PAGA claim should be dismissed without prejudice.

II. THE CLASS CONTENTIONS SHOULD BE STRICKEN/DISMISSED.

It is without dispute that the Court set April 12, 2010, as the last date to seek to certify a class in this action.[1] It is also without dispute that Plaintiff did not seek to certify a class on or before that April 12 deadline. As such, Plaintiff's class allegations found in his April 14 pleading should be stricken or dismissed.

Plaintiff has no meaningful response. Rather, Plaintiff diverts and claims that Defendant seeks dismissal of the entire pleading because the pleading was filed after the deadline to file a pleading. Not so; Defendant requests that certain allegations (the class allegations) be stricken/dismissed because the time to move to certify a class has come and gone.

Next, contradicting his concession regarding his improper PAGA claim, Plaintiff tepidly argues that the Court silently and inferentially vacated its Rule 16 Order all without request, briefing, showing of good cause and order, and despite the Court's clear instruction that it would not modify its Order.[2] Specifically, Plaintiff

[1] Ex. 1, to Motion, at 14:23-15:3, 12/21/09 Transcript of Proceedings ("the schedule for filing a class certification motion will be as follows," that "I will not extend these dates" and that counsel are "advised and do what you need to do within this schedule"); Opp. at 7:14-15 ("Plaintiff left the [December 21, 2009] Scheduling Conference believing the dates in the Scheduling Order were going to be in effect."); Docket 34, Scheduling Order ("Motion for Class Certification: April 12, 2010").

[2] *See* Ex. 1, to Motion, at 14:23-15:3, 12/21/09 Transcript of Proceedings ("the schedule for filing a class certification motion will be as follows," that "I will not extend these dates" and that counsel are "advised and do what you need to do within this schedule").

notes that when the Court struck his second pleading (as well) for failing to heed the Court's clear pleading instructions and despite taking the maximum time period to amend, it granted the standard twenty day period to re-plead (Docket 34). Twenty days after that March 24 Order is April 13. Plaintiff concludes that since he could take up to April 13 to re-plead his claims, the Court implicitly vacated the Rule 16 Order to continue all deadlines (including the April 12 class certification deadline) to unspecified dates. Plaintiff's contention is not tenable. As noted above, the Court had stated it would not change these dates. Further, no motion, let alone showing of good cause, was ever made. Moreover, thereafter on April 24, the Court expressly confirmed that April 12 is and was the deadline to move for class certification. (Docket 34.) Obviously, the Court did not silently and inferentially vacate its Rule 16 Order without so much as a request to do so, briefing, and establishment of good cause.

The Court's Rule 16 Scheduling Order requires that any Motion for Class Certification be filed by April 12. Plaintiff did not file any such motion. As such, his class allegations should be dismissed / stricken.

III. PLAINTIFF'S IMPROPER REQUEST IN AN OPPOSITION THAT THE COURT CHANGE THE RULE 16 SCHEDULING ORDER *SUA SPONTE*, SHOULD BE IGNORED OR DENIED.

Next, admitting that the Court did not silently modify its Rule 16 Order, Plaintiff requests that the Court do so now, *sua sponte*, despite the fact that Plaintiff has a properly noticed Motion scheduling for July 26 seeking to do just that. Plaintiff's improper request for "sua sponte" relief should be denied.

A. Whether Good Cause Exists To Modify The Rule 16 Order Should Be Addressed In The Context Of Plaintiff's Pending Motion For That Relief.

On April 21, 2010 – eighteen weeks after this Court issued its Scheduling Order – Plaintiff called the Court's Clerk to determine whether the Court really

meant what it said on December 21 (which, Plaintiff concedes he fully understood then to be an Order of the Court). Opp. at 7:14-15. When on April 22, Plaintiff learned from the Court Clerk that, yes, in fact the Court too understood what it said on December 21 to be an Order of the Court, Plaintiff then waited another six weeks to file a Motion to Amend the Court's December 21 Rule 16 Order, and scheduled a July 26 as the hearing date for his Motion. That Motion is pending.

Defendant will address Plaintiff's Motion to Amend when it files its Opposition at least 21 days before the hearing on that Motion. The Court should not act *sua sponte* to address these issues, and should instead consider them in the context of the Motion brought by Plaintiff.

B. No Good Cause Supports Plaintiff's Request For *Sua Sponte* Modification of the Rule 16 Order.

Even were the Court to reach this requested "*sua sponte*" relief, it must be denied under pertinent standards. Plaintiff presents not even a glimmer of good cause to change this Scheduling Order, let alone *sua sponte*.

As Plaintiff concedes, even if so inclined to act, this Court may modify its prior Scheduling Order only for good cause. Opp. at 8:4-8.[3] None is presented here; only procrastination – both in bringing his pleadings into compliance, and in pursuing his claims. In this regard, by mandating discovery cut-offs, Rule 16(b)(3) was intended to:

> deal[] with the problem of procrastination and delay by attorneys in a context in which scheduling is especially important – discovery.

See FRCP 16 Adv. Comm. Notes (1983 amend.). Rule 16(b) further provides that:

[3] Once a scheduling order issues, no later amendment of the pleadings is permitted unless the Court first modifies the scheduling order on a showing of "good cause" to allow Plaintiff to file a motion to amend. Fed. R. Civ. P. 16(b). *See e.g., Bato v. Lab. Corp. of America Holdings*, No. 09-cv-04671, Docket No. 44, Order at 11 (Morrow, J.) (C.D. Cal. Feb. 8, 2010) *citing* Fed. R. Civ. Proc. 16(b); *Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1294 (9th Cir. 2000); *Johnson v. Mammoth Recreations, Inc.* 975 F.2d 604, 609 (9th Cir. 1992).

> A schedule shall not be modified except upon a showing of good cause and by leave of the district judge.

FRCP 16(b) (emph. added). "A scheduling order is not a frivolous piece of paper, idly entered, which can be cavalierly disregarded by counsel without peril." *Johnson v. Mammoth Recreations, Inc.*, 975 F.3d 604, 610 (9th Cir. 1992).

"The district court may modify the pretrial schedule 'if it cannot reasonably be met despite the diligence of the party seeking the extension.'" *Id*. at 609 (quoting FRCP 16 Advisory Committee's notes (1983 amend.)) (emph. added). "A party demonstrates good cause for the modification of a scheduling order by showing that, even with the exercise of due diligence, he or she was unable to meet the timetable set forth in the order." *Matrix Motor Co. v. Toyota Jidosha Kabushiki Kaisha*, 218 F.R.D. 667, 671 (C.D. Cal. 2003). Indeed, it is not necessary for the party opposing modification of the scheduling order to show prejudice; rather, "the focus of the inquiry is on the moving party's reasons for seeking modification. If that party was not diligent, the inquiry should end." *Johnson*, 975 F.2d at 609 (emph. added).[4]

Further, a request to modify a Scheduling Order must be made promptly upon learning that one cannot comply. *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 608-09 (9th Cir. 1992). On April 21, 2010 – having already delayed sixteen weeks since the date the Court issued its Scheduling Order – Plaintiff called the Court's Clerk to determine whether the Court really meant what it said on December 21. When on April 22, he learned from the Court Clerk that, yes, in fact the Court too understood the December 21 Order to be the Order of the Court – as did Plaintiff back in December[5] – Plaintiff then waited another six weeks to request *sua sponte* relief from it. Plainly, this is not diligence.

Moreover, Plaintiff does not even argue that he could not comply with the

[4] With respect to the diligence relevant to the relief requested by Plaintiff, this Court's rules are instructive: "Counsel should . . . notice depositions sufficiently in advance of the cut-off date to comply with this local rule." Civil L.R. 26-2 (commentary).

[5] Opp. at 7:14-15

deadlines that he admits he fully understood to be deadline (Opp. at 7:14-15) – for example by:

- properly amending his pleading in a timely fashion to comply with explicit instruction,
- not rejecting all meet and confer efforts to cajole such compliance,
- actually engaging in discovery, rather than propounding only when no pleading was pending, and
- not re-propounding or pursuing his discovery when a pleading was pending.

Plaintiff makes no claim that he could not have met the April 12 class certification deadline with diligence and reasonable conduct – the central inquiry. As such, no good cause exists to modify the Court's Rule 16 Order.

1. **Plaintiff's Words And Actions Concede That He Fully Understood the Court's December 21 Order to Be The Scheduling Order In This Action.**

As a starting point, there simply is no question that Plaintiff fully understood this Court's December 21 Order issued from the bench. Consider that:

- On December 21, 2009, the Court ruled that "[T]he schedule for filing a class certification motion will be as follows. And I will not extend these dates. So be advised and do what you need to do within this schedule. [¶] The class certification motion must be filed by April 12." Ex. 1, at 14:23-15:3.
- Plaintiff concedes that he "left the [December 21, 2009] Scheduling Conference believing the dates in the Scheduling Order were going to be in effect." Opp. at 7:14-15.
- Throughout January 2010, the parties exchanged writings acknowledging that "the Court set the FRCP Rule 16 deadlines on December 21," and what those deadlines required of the parties. Ex. 2 to Motion. *See also id.* ("the Court ordered on December 21, 2009, that….").
- Plaintiff "agreed" that the Court's December 21 Scheduling Order required

him to perform certain tasks, and exercise certain options, by certain dates. Ex. 4 to Motion.

- The parties then acted on those deadlines by, for example, exchanging their Rule 26 disclosures by January 11, 2010 exactly as ordered by the Court in its Scheduling Order; and filing their Local Rule 16-15 Settlement Procedure Selection on January 25, 2010 exactly as ordered by the Court in its Scheduling Order (Docket # 24).

At no time did anyone claim that there was even an ounce of "ambiguity" regarding whether the Court had issued its deadlines.

2. **Plaintiff's Tales Of Subsequent Confusion Coupled With A Failure To Educate Or Clarify Any Such "Confusion" Do Not Establish "Good Cause".**

Now, six months later, Plaintiff claims that within a few days after the Court's December 21 Order and admonition to act diligently, seeds of doubt were somehow sown in Plaintiff's mind as to whether the Court really meant what it said and all heard. Plaintiff's tales of doubt, apart from being fiction, do not describe reasonable conduct and diligence.

(a) *Defendant Told Me Different.*

Plaintiff claims that a draft declaration from Defendant's counsel – dated January 12, 2010[6] – somehow confused Plaintiff as to whether the Court had actually set deadlines on December 21, as all had witnessed the Court doing. The draft declaration read:

> Central District Local Rule 37-2.1 provides that "a copy of the order establishing the initial case schedule, as well as any amendments, must be attached to the stipulation or to a declaration filed in support of the motion." L.R. 37-2.1. The Court held a

[6] This declaration was prepared during the meet and confer for a motion for a protective order concerning 30(b)(6) deposition notices that Plaintiff had propounded to Defendant on minimal notice and when no pleading was even pending

> scheduling conference on December 21, 2009, during which certain deadlines were established, including an August 6, 2010 deadline for the close of fact discovery. However, to date, no written order respecting the initial case schedule has issued.

Ex. 1 to Opp., at p. 36 (para. 15) (emphasis added). How anyone could read this as an assertion that no deadlines had been set, remains a mystery.[7] But even had this draft declaration by Defendant's counsel created "confusion" in Plaintiff's mind as to the Court's intent, did Plaintiff's counsel call the Court to determine whether the December 21 hearing had all been a dream (despite the fact that he too believed that deadlines had been set on December 21)? No; though he admits he knew to call the Court had he encountered any real confusion.[8] There was no doubt – let alone reasonable doubt. Rather, throughout January, including after receipt of this draft declaration, as discussed above Plaintiff complied with what he knew to be the Court's Scheduling Order. Plaintiff's new claim of confusion is not only unreasonable, it is untrue.

(b) *My Defective Discovery Demands Confused Me.*

Next, Plaintiff infers that Defendant's refusal in January to appear for depositions in response to 30(b)(6) notices propounded by Plaintiff when there was no pleading pending at all,[9] somehow makes his failure to abide by the April 12 deadline to move for class certification "reasonable." Again, not so.

First, we note that Plaintiff agreed that its deposition notice propounded in the

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[7] It states exactly the opposite (while acknowledging that no written Order had yet issued, thereby requiring the submission of the transcript had the draft Motion actually been filed). The Motion did not go forward because Plaintiff acknowledged that his deposition notices were improper on many grounds, not the least of which is that he had not yet bothered to get a pleading on file when he propounded them despite the Court's strong admonition that Plaintiff needed to act diligently to get his pleading on file and meet his deadlines.

[8] Plaintiff only laced that call almost 16 weeks later, in April, when he began to set up his motion for relief from this Court's Scheduling Order. (Opp. at 6:18-19.)

[9] This was while Plaintiff delayed in filing a new pleading after his first pleading was dismissed for containing nothing but conclusions.

absence of a pleading was invalid, and withdrew it. Plaintiff did not, however, withdraw his written discovery, to which Defendant responded (attached as exhibits to Plaintiff's Opposition) and Plaintiff then abandoned.

Second, after Plaintiff filed a new pleading in late January (having taken the maximum allowable time to do so, thereby wasting remaining time for class certification), Plaintiff did not thereafter propound any new and proper discovery whatsoever, or move to compel on any of his prior discovery that Defendant had answered. Plaintiff did nothing. In his words, Plaintiff "deemed it reasonable to defer formal discovery until the class allegations were at issue." Opp. at 7:20-24.

Third, the notion that a defendant's discovery responses to discovery propounded in the absence of any pending pleading (which this Plaintiff concedes were appropriate), permits a plaintiff to simply ignore a Court's Rule 16 Scheduling Order, including a deadline to move for class certification, is not tenable. Plaintiff (i) delayed as long as possible in getting his various deficient pleadings on file, (ii) did nothing to obtain whatever information he thought he needed to move for class certification, and (ii) did nothing to obtain an extension of his deadline to move for class certification.

(c) ***My Delay And Failure To Heed Explicit Court Instruction Makes My Conduct Reasonable.***

Next, Plaintiff infers that his repeat failures to plead a meal/rest break claim (despite explicit instructions form the Court as to what would be required of him), coupled with his having taken the maximum amounts of time granted him to offer his various deficient pleadings after the prior pleading had been dismissed, somehow renders his failure to pursue any discovery, and to move for class certification by April 12, "reasonable." Stating the argument defeats it.

* * *

Plaintiff's "showing" of "good cause" amounts to extraordinary procrastination "explained" by unfounded, reckless and unverified inferences

supposedly drawn by Plaintiff concerning the meaning of a December Scheduling Order that Plaintiff feely admits he understood in December 2010 to be just that – a Rule 16 Scheduling Order. And he claims to have drawn these inferences despite:

- his contrary actions and words at the time;
- the Court's instruction that it would not change the Scheduling Order (Ex. 1, to Motion, at 14:23-15:3); and
- no effort to verify this supposed inference drawn directly contrary to what Plaintiff concedes he heard and understood on December 21, 2009.

This is not good cause. It is the antithesis of good cause.

Nor does Plaintiff offer any explanation for his failure to seek this relief in a timely fashion.

Plaintiff's request that the Court modify it Rule 16 Order "sua sponte" relief should be ignored or denied.

IV. CONCLUSION

For all these reason, Defendant's Motion to Dismiss/Strike should be granted.

Dated: June 14, 2010

JONES DAY

By: /s/ Mark D. Kemple
Mark D. Kemple
Attorneys for Defendant
WENDY'S INTERNATIONAL, INC.